

Appendix XIII

FAQs: Legal

1. Do we need to follow a formal competitive process to do outreach to potential alliance partners?

No. Looking for alliance partners who will bring their own resources to the alliance is a different proposition than the processes USAID must follow to award Federal contracts or Federal grants for the implementation of alliance-supported programs. However, fairness and transparency should be maintained as overarching principles in conducting outreach efforts and forming alliances. Exploration of possible alliances should take place in a transparent manner and generally should involve wide consultation with possible partners. Particularly in instances in which USAID initiates a proposed alliance, we must be certain that our planning identifies and reaches out to the full range of possible partners, taking into consideration the expected purpose and scope of the alliance. At the same time, we should remember that complexity increases with the number of partners, and make every effort to agree on an alliance whose size and governance structure are manageable. In general, alliances that are expected to include one or more commercial firms should consider offering the opportunity for participation to additional interested commercial firms.

Note that when the plan is for an alliance, once formed, to implement activities of the alliance through a USAID awarded contract or grant/cooperative agreement, USAID must follow contract (Federal Acquisition Regulation) or assistance (ADS 303) rules in connection with the making of such awards.

2. Should a USAID employee who is trying to put together an alliance with private firms be concerned with the application of the Standards of Conduct concerning conflicting financial interests (18 USC 208) if that employee has a financial interest in one of the firms being considered for the alliance?

Maybe, but probably not in most situations. As is always the case in applying 18 USC 208 to a specific situation, the details are very important and the advice of GC or an RLA is helpful. The statute *prohibits an employee from participating personally and substantially in an official capacity in any particular matter in which, to his knowledge, he or any person whose interests are imputed to the employee has a financial interest, if the particular matter will have a direct and predictable effect on that interest.*

So, take the example of a Mission Director in Country X who is trying to facilitate the formation of an alliance among US and local businesses to support youth training initiatives. The alliance will be of the “parallel financing” sort (see discussion below) and will be documented in a broadly stated non-obligating Memorandum of Understanding (MOU) which outlines and coordinates the individual contributions of the various alliances members. That is, while the alliance as a whole will have a coordinated discussion of the development results they are trying to achieve, each alliance member is responsible for spending its own resources for the portion of the alliance’s work that they agree to take on. The Mission Director owns stock in one of the US corporations that is a member of the alliance. Does the Mission Director have a conflicting financial interest within the meaning of 18 USC 208? No. We would not consider the MOU to be a “particular matter” within the meaning of the statute because the nature of the MOU is a non-legally binding document that does not obligate USAID funds. Further, it is questionable whether the alliance reflected by the MOU, while being of general benefit to the US corporation (otherwise they would not be a member of the alliance) could be deemed to have a “direct and predictable” effect on the financial interest of the corporation or the employee who owns stock in the corporation.

Tools for Alliance Builders

In a different alliance situation, this analysis might change. For example, if a USAID project officer in Country Y is helping put together an alliance with a single or small group of US firms to help the firms commercialize their otherwise non-commercially viable health products, there might be issues under 18 USC 208 if the USAID officer owns stock in the US firm. For instance, the MOU, rather than a broad umbrella document, might be more specifically focused on the work plan to achieve commercialization and might refer to USAID implementing instruments that will deliver specific assistance to the effort. Thus, the MOU and overall arrangements, even if the MOU itself is a non-obligating document, would need to be evaluated to reach a conclusion as to whether or not it is a “particular matter”. Also, since the nature of the alliance is to promote the commercialization of products, the USAID officer’s role in arranging assistance for the project would need to be reviewed to reach a conclusion as to whether it has a “direct and predictable effect” on the financial interests of the US firm.

Please consult with GC or your RLA for further advice on this issue.

3. What about organizational conflicts of interest (OCI)?

OCI can occur in situations in which a firm or organization that is involved in the planning or design of a program also could be awarded a contract to implement the same program. Thus, OCI may be an issue when planning collaboratively with alliance partners, if one or more of these partners also has the potential to be awarded a contract (rather than a grant or cooperative agreement) to carry out work under or related to the alliance. In brief, OCI restrictions are not required when outside organizations participate in:

4. Discussions regarding concepts, ideas or strategies, i.e., the stage prior to identifying possible implementation instruments.
5. Discussions regarding ongoing and completed activities (whether under contracts or assistance instruments).
6. Matters involving only assistance (not contract) instruments, both during the competition stage and once the activity is in progress.

In discussions regarding concepts, ideas and strategies, the key question is the extent of association with a specific procurement—e.g., does the discussion of concepts, ideas and strategies spill over into decisions about the implementation instrument to be used and/or details that will be written into the statement of work. OCI does not exist in the abstract. If one cannot identify a procurement that would be compromised by discussions with outside organizations, then there is no OCI under the federal standard.

The overarching principle for both contracts and assistance is fundamental fairness. In contrast to the contract context (which is more heavily regulated by statutes and Agency policies), there are no specific legal or Agency-level restrictions on participation of outside organizations when only assistance instruments (grants and cooperatives agreements) are involved. However, in view of the fairness concern as well as to ensure that the Agency receives the best services or products available, USAID staff who are attempting to put together alliances are encouraged to review assistance competitions case-by-case to consider whether certain restrictions make sense under the circumstances.

GC and OP can provide additional guidance on this subject.

4. How creative can USAID staff be in putting together alliances?

Very creative. Many different alliances are described in the GDA Toolkit, many of which reflect real creativity. USAID staff who are attempting to put together an alliance are encouraged to think creatively about what the Agency wishes to achieve under the alliance, who are potential alliance partners, the best way to structure the alliance, and how USAID and alliance partner resources can be used to meet alliance objectives. It is important that USAID staff confer with GC or their RLA early in the design process to discuss viable frameworks and to identify applicable parameters.

5. What governance structure should an alliance have?

This will depend on the purpose of the alliance and decision made by the members with respect to governance arrangements. We have generally discussed alliance structures in terms of two broad categories: (a) parallel financing; and (b) pooled resources.

Parallel Financing

Under this approach, the alliance partners reach agreement on how to work together to address a development problem, with each partner establishing a separate mechanism (e.g., grant, contract) through which to provide resources to support the alliance's work (financial, human, and/or in-kind). The coordination and management of parties' inputs require negotiation of the respective roles and resource contributions of each party. In addition to each alliance member's own funding mechanism, this approach typically involves a Memorandum of Understanding (MOU), letter of intent or similar document among the alliance partners that lays out the common agenda and the specific responsibilities of each party. Though not binding, this document sets forth the intent of the partners to work collaboratively in pursuit of a shared goal. As an MOU does not obligate funds, a bureau or mission official may sign the document. GC or the appropriate Regional Legal Adviser should assist with the negotiation and drafting of the MOU. It will be especially important for USAID and the other parties to the MOU to understand and to the extent possible clarify the anticipated role and type of contribution of each party as well as the process for reaching implementation decisions. In some early stage alliances, the MOU will only generally address these matters. For other alliances that are further along in development, more specific working arrangements can be outlined. In addition, OP also should be involved in the preparation of the MOU if you intend to award a grant or other instrument in support of the alliance. This will require your attention to the question of whether competition is appropriate or an exception to competitive procedures is called for.

In this type of alliance, USAID typically might award a grant or cooperative agreement to an NGO that is supporting or participating in the alliance. There will be situations in which USAID will award a contract for services or goods in support of an alliance (or issue a task order under an existing Indefinite Quantity Contract). Recently, some missions have been exploring how public-private alliance concepts might be incorporated into contract solicitations. However, in general, it is anticipated that USAID will rely significantly on grants and cooperative agreements to provide financial support to public-private alliances.

Pooled Resources

Under this approach, USAID and its partners establish a formal alliance governance structure for the purpose of attracting resources and making joint program decisions. These alliances may involve fairly complex organizational structures and legal documentation. Alliances of this type may involve the formation of a new legal entity, such as a U.S. NGO that secures 501(c)(3) status under the Internal Revenue Code to facilitate tax-advantaged private contributions. Or the alliance members may agree to operate as an

Tools for Alliance Builders

informal partnership to direct the policies and programs of the alliance. The structure may include a technical expert committee to support the board of directors of the alliance and the development of clear operating procedures for the alliance's program. Under this general approach, whether or not a new legal entity is established, the alliance enters into an agreement with a Public International Organization (PIO), such as UNICEF or the World Bank, to manage the alliance's resources as a trustee or fiduciary agent. In some circumstances it may be possible for other types of financial institutions to play this role. One or more additional agreements with existing organizations may be entered into to provide administrative and other services to the alliance program. The specific role(s) played by the PIO or other institution may vary from alliance to alliance.

For this type of alliance, USAID support typically takes the form of a grant to the NGO established by the alliance (if deemed grant-worthy), or to the PIO or other financial institution that serves as trustee for the alliance's resources. When managed by a PIO, USAID grant funds may be commingled with the funds of other contributors and managed collectively. USAID will use a tailor-made and generally streamlined form of grant agreement that requires an approved exception to the general requirement of competition, as well as deviations under ADS Chapters 303 and 308. In addition to the grant agreement, substantial effort generally will be required in connection with the negotiation of the alliance's corporate charter, by-laws, trust agreement, operating procedures and other documents necessary to establish its operational structure. Among other things, it will be necessary to specifically address the manner in which USAID's interests will be represented in the alliance entity's governance structure. For instance, this may involve USAID (or in some instances other USG) representation on the entity's board of directors, donor advisory committee and/or technical working groups. (Note that if it is proposed that a USAID official would serve on the board of directors, there are conflict of interest issues under 18 USC 208 that will need to be resolved.) GC or RLA advice should be sought early in the process of considering this type of alliance structure. Examples of this type of alliance include the Global Alliance for Vaccines and Immunization (GAVI) and the Global Alliance for Improved Nutrition (GAIN).

A simpler (and more common) "pooled resource" approach is when USAID makes a grant to an existing NGO, quite possibly a traditional USAID implementing partner, that is also receiving and managing contributions from other parties. In this case the USAID grant is accounted for in the same manner as typical USAID grants under ADS 303 and 22 CFR 226, but USAID funds and those of the other contributors are "pooled" in the sense that they all are managed by the same implementing NGO. Similarly, in situations in which USAID receives a donation from an outside party (see question #9 below), the donated funds are accounted for separately from USAID appropriated funds but are "pooled" in the sense that they are managed by USAID in conjunction with appropriated funds for a designated program.

6. Is there a model MOU document?

There are useful examples, but no model. MOUs, however, at a minimum, *should always include language indicating that the parties specifically acknowledge that the MOU is not an obligation of funds, nor does it constitute a legally binding commitment by any party.* MOUs should further include language stating the parties are entering into this MOU while maintaining their own separate and unique missions and mandates, and their own accountabilities; and that nothing in the MOU shall be construed as superseding or interfering in any way with other agreements or contracts entered into between the parties, either prior to or subsequent to the signing of this MOU.

Tools for Alliance Builders

Note that GC is collecting copies of MOUs for existing alliances (and for alliances now under development) that are available for review. In considering and negotiating MOUs and similar agreements, you will of course need to prepare documents that meet the needs of your specific alliance. Topics covered in your alliance MOU may differ from those of other alliances. GC or RLA assistance should be sought in negotiating and drafting the MOU or similar document. While an MOU itself is not an obligating document, it may contemplate a future grant or contract award by USAID. If this is the case, M/OP or RCO assistance should be sought with respect to the choice of instrument and the procedures to be followed, and the question of competition (or waivers of competition) should be addressed.

MOUs can be used at different stages of the process of building an alliance relationship with companies, foundations or other institutions. An early stage MOU may serve the purpose of indicating the agreement of USAID and other parties to discuss and where possible collaborate on development issues of mutual interest. A more developed MOU might identify a specific focus for the alliance, establish a basic alliance decision-making structure and discuss implementation understandings (to be undertaken by USAID and other alliance members through the award of separate contracts or grants). Thus, in all instances, care should be given to the preparation of MOUs, to be sure they accurately reflect the purpose of the document, the roles that the parties plan to undertake, the understandings that have been reached and the process for reaching any further agreements contemplated with respect to implementation.

Who can sign a non-obligating MOU of the sort described above? They may be signed by Assistant Administrators and their designees in USAID/W and by Mission Directors and their designees in the field. *Who should sign them?* This is a judgment call for the head of the relevant operating unit, but in most cases alliance MOUs probably should be signed at no lower than the Assistant Administrator or Mission Director level. In some instances, for alliances that involve more than one program bureau or which are especially significant because of the subject matter of the alliance and/or the alliance partners involved, it will be appropriate to consider whether the Administrator or Deputy Administrator should sign for USAID.

7. What about “due diligence”?

A “due diligence” investigation is an inquiry about a prospective alliance partner that should be carried out prior to engaging in alliance negotiations. While a due diligence exploration can take many forms and range from quick and simple to long and complicated, its essence is to investigate what is often called the “triple bottom line”—i.e., is the prospective partner socially responsible, environmentally accountable and financially sound. The GDA secretariat can provide assistance by accessing certain corporate information databases and other resources. As you consider the type and extent of due diligence review that may be appropriate with respect to particular alliance opportunities, please keep three things in mind. First, *it may not be necessary to investigate every possible avenue of consideration*. For most transactions that you might consider, it would be too costly and too time consuming. Particularly for small alliances, too much due diligence can kill the transaction. Note also that due diligence, once beyond an initial phase, *is an ongoing process*. Indeed, alliances take time to develop, implement and manage. As a final point, note that it is not a requirement that a prospective alliance partner must have adopted any one or more of the several sets of international principles referred to in the guidance. Rather a prospective partner’s adoption of such principles is a factor for USAID to consider in making an informed decision about whether a company would be an appropriate alliance partner. The main point is that we should make conscious and informed, not random, decisions when conducting due diligence.

Tools for Alliance Builders

Please contact the GDA Secretariat should you require further assistance or need additional information.

8. Can traditional Grants and Cooperative Agreements be used to support alliances?

Yes, while some alliance arrangements may require deviations from existing policy and new, streamlined forms of grant documents, in most situations alliances may be supported with existing policy and traditional grant mechanisms. The following summary is not exhaustive and all alliances should be considered individually with cognizant legal, procurement, and/or GDA Secretariat assistance as needed.

The process of identifying partners and jointly defining problems and their resolution may be conducted as part of a competitive grant-making process. Alternatively, if multiple alliance ideas in a sector, region or country are being informally discussed, but no formal ideas have been presented, you could consider holding a conference specifically to encourage and develop innovative ideas. Such a conference could be widely advertised to potential partners and posted on the Global Development Alliance web site (and/or others, as applicable). The result of this conference could form the basis for a Request for Applications (RFA) or Annual Program Statement (APS) incorporating some of the alliance ideas discussed at the conference, or it might stimulate the submission of proposals to USAID.

Use of APS or RFA to Seek Innovative Approaches. Using either an RFA or APS, you can issue a solicitation that clearly identifies the resulting award as being made to support a public-private alliance. If alliance members agree, the solicitation can include the names of alliance partners and the resources that they will be supplying (money or in-kind support).

Another approach would be for your solicitation to challenge prospective applicants to identify and include new and unique resources (technical and/or financial) in their proposal. Applicants could be instructed to factor these resources into their application and overall program as part of their cost share. Technical evaluation criteria in the solicitation may include points for the best-proposed use or integration of alliance partners, whether those partners were identified in the solicitation or discovered and cultivated by the applicant.

In general when using competitive solicitations that will result in a grant or cooperative agreement award to NGOs or educational institutions for the purpose of supporting public-private alliances, the solicitation documents should specify that the recipient is required to independently negotiate appropriate agreement(s) with all proposed alliance partner(s). In cases where USAID enabled the relationship by identifying in the solicitation the alliance partner(s) to be used or by suggesting possible alliance partners, it also should specify that USAID has no direct relationship with such alliance partner(s).

Use of Exceptions to Competition. Exceptions to competition specified in ADS Chapter 303.5.5d are available to the extent necessary to facilitate the formation of an alliance. Some exceptions which might be particularly relevant to entering into and providing grant support to alliance relationships are: "Amendments and Follow-Ons," "Unsolicited Applications," or "Predominant or Exclusive Capability." In all instances, coordinate any envisioned non-competitive approach with your Cognizant Agreement Officer early in the planning phase. Also, while you are encouraged to use the available exceptions to competition where called for in order to meet development objectives, remember that the exceptions must still be documented and justified. *Note that if you approve and fund a*

proposed alliance under the framework of an APS, it is not necessary to rely upon an exception to competition – the APS process is a competitive one.

9. Do USAID officers have the authority to engage in fundraising?

Yes. But first it is useful to distinguish traditional fundraising campaigns from the collaborative alliance building efforts that are the main focus of GDA. In general, a fund-raising campaign suggests that the contributor of funds will have a passive role with respect to the organization or project they are supporting. The contributor does not help define the development problem and how it might be resolved; rather the contributor donates money or property for an already defined purpose. On the other hand, in general, GDA's focus on public-private alliances emphasizes a collaborative alliance building effort in which USAID seeks to jointly define, with private alliance partners, development problems and appropriate interventions.

GC has prepared guidance that clarifies the conditions under which USAID officials may engage in traditional fund-raising, i.e., solicit contributions from individuals, corporations and foundations for USAID projects and activities, or for the projects and activities of other organizations. The guidance sets forth procedures to be followed to ensure potential conflict of interest problems are avoided and for USAID officials to receive Assistant Administrator level approval before undertaking solicitations. A key requirement is that the solicitation must be structured to avoid any appearance that a contributor will receive preferential treatment in its dealings with USAID (or would receive any discriminatory treatment if it declines to contribute). The procedures do not apply to public and private donor coordination efforts, or requests for cost-share contributions, and in general do not apply to instances in which USAID does not initiate the fundraising activity.

The collaborative efforts of USAID officials to jointly establish and fund alliances are more akin to donor coordination than they are to the traditional solicitation of funds. Thus, the procedures for approving the involvement of USAID officials in traditional solicitation campaigns need not be followed in connection with efforts by USAID officials to form public-private alliances. However, the basic concept behind that guidance also applies in the alliance building context: USAID officials should conduct themselves in a way to avoid any appearance that a potential alliance partner by joining an alliance will receive preferential treatment in its other dealings with USAID (or would receive any discriminatory treatment if it declines to contribute). Also, note that in some situations, a collaboratively developed public-private alliance in which USAID participates also may have a traditional fund-raising component, to which the procedures in the GC guidance memorandum would apply if USAID officials wish to engage in a solicitation campaign for the alliance.

Please contact GC or your RLA with any questions.

10. Does USAID have the authority to accept cash and in-kind donations from governments as well as private parties?

Yes. Section 635(d) of the Foreign Assistance Act provides this authority to USAID. ADS Chapter 628 describes the procedures for accepting and accounting for donations. GC can provide examples of situations in which companies or other governments have chosen to contribute resources to USAID following these procedures. (Note that contributions to the U.S. Government by individuals and corporations are considered to be tax-deductible charitable contributions under Section 170 of the Internal Revenue Code.) This approach would, in effect, have USAID serve as the trustee for the management of contributions by other alliance members, and thus amounts to a simpler version of the "pooled resources"

Tools for Alliance Builders

structure discussed under question #4 above. In its simplest form, this approach might involve the donation by a single company to USAID to expand an existing USAID program (e.g., increasing the funding for an already-awarded assistance instrument.) USAID and alliance members also could use this approach to jointly design and fund a new grant, cooperative agreement or contract to implement an alliance's program.

Note that a proposal to accept in-kind donations (for instance equipment or other property) from outside parties will present special issues, including valuation, titling and potentially storage/delivery arrangements. Given these administrative requirements, USAID generally prefers not to directly receive in-kind donations. Rather, we typically have encouraged potential donors of property to work with NGOs that have established procedures for accepting such donations.

11. Do USAID's usual legal and policy requirements apply to public-private alliances that USAID supports?

Yes. During the planning stages of a potential alliance, the normal list of statutory, regulatory and policy requirements that apply to USAID-funded activities should be reviewed. For instance, USAID's environmental review requirement will need to be addressed in accordance with USAID Reg. 16. In general, as with any activity, the items listed in the country and activity checklists that are updated annually by GC should be addressed and complied with. In addition to these checklists, you will need to consider the applicability of the Agency's policy determinations and statements on various subjects that are included as references to the ADS 200 series. This of course assumes that USAID will be providing financing for the alliance. In some situations, USAID may simply play a matchmaker role, or may provide in-kind resources rather than direct funding.

Office of the General Counsel: drafted 11/15/02; revised 12/04/02; 01/03/03; revised 6/17/04